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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/765,327	01/28/2004	Guerino G. Sacripante	118410	9875
27074	7590	05/19/2008	EXAMINER	
OLIFF & BERRIDGE, PLC. P.O. BOX 320850 ALEXANDRIA, VA 22320-4850				FLETCHER III, WILLIAM P
ART UNIT		PAPER NUMBER		
1792				
		NOTIFICATION DATE		DELIVERY MODE
		05/19/2008		ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

OfficeAction27074@oliff.com  
jarmstrong@oliff.com

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/765,327	SACRIPANTE ET AL.
	<b>Examiner</b>	<b>Art Unit</b>
	William P. Fletcher III	1792

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 11 February 2008.

2a) This action is **FINAL**.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-13,22-35 and 37-40 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-13,22-35 and 37-40 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.

5) Notice of Informal Patent Application

6) Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Response to Amendment***

1. The amendment and remarks filed February 11, 2008, are noted with appreciation.
2. Claims 1-13, 22-35, and 37-40, remain pending.

### ***Response to Arguments***

3. Applicant's arguments filed February 11, 2008, have been fully considered but they are not persuasive.
  - A. Applicant argues that both Nagel and the admitted prior art both teach away from the geometric size distribution (GSD) taught by Sacripante. This is not persuasive:
    - i. Both Nagel and the admitted prior art are silent with respect to the GSD of the particles. Consequently, they do not expressly teach away from the claimed GSD.
    - ii. Nagel's discussion of undesirable results is limited to instances in which the particle size distribution includes "an excessive portion" of either very large or very fine particles. See 6:3 ff. An excess of coarse particles causes "an undesirable surging of the bed and to produce imperfect coatings which are frequently grainy in appearance." An excess of fine particles (0-5 microns) leads to undesirable dusting and agglomeration. As noted above, this discussion in no way calculates or otherwise discloses a particular GSD or range of GSDs and, as such, cannot constitute a

teaching away from a particular GSD or range of GSDs. On the contrary, Nagel's disclosure provides guidance as to how to select an appropriate GSD.

iii. Further, the Examiner notes that while a particle size range of 50-300 microns is disclosed as preferable, such a disclosure does not rise to the level of a teaching away from particle sizes outside this range since particle sizes less than 50 microns or greater than 300 microns are not disparaged. Rather, GSDs having excessive amounts of particles between 0-5 microns or greater than 300 microns are taught as undesirable. Such particles sizes are not, in-and-of-themselves, expressly excluded.

iv. Finally, Applicant has asserted that the admitted prior art teaches away from Sacripante's GSD, but has provided no evidence in support thereof.

B. At the bottom of page 9 of the remarks, Applicant appears to assert that the claimed invention represents the solution to a long-felt need in the art. Applicant is reminded that the arguments of counsel cannot take the place of evidence in the record.<sup>1</sup> MPEP 716.01(c) lists examples of attorney statements which are not evidence and which must be supported by an appropriate affidavit or declaration. This list includes evidence of the solution of a long-felt need. Since Applicant's assertion that the claimed invention represents the solution to a

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<sup>1</sup> MPEP 2145(I)

long-felt need is not supported by such evidence, it is not considered to be of probative value and is not persuasive.

***Claim Rejections - 35 USC § 103***

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
5. **Claims 1-13, 22-35, and 37-40, are rejected under 35 U.S.C. 103(a) as being unpatentable over Applicant's admitted prior art or Nagel (US 3,028,251 A), either in view of Sacripante et al. (US 5,593,807 A).**

- A. These claims are rejected for the same reasons set forth under this heading in the prior Office action.
- B. These claims remain rejected for the same reasons set forth under this heading in the prior Office action as explained above.

***Conclusion***

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. The prompt development of clear issues in the prosecution history requires that applicant's reply to this Office action be fully responsive (MPEP § 714.02). When filing an amendment, applicant should specifically point out the support for any amendment made to the disclosure, including new or amended claims (MPEP §§ 714.02 & 2163). A fully responsive reply to this Office action, if it includes new or amended claims, must therefore include an explicit citation (i.e., page number and line number) of that/those portion(s) of the original disclosure which applicant contends support(s) the new or amended limitation(s).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to William P. Fletcher III whose telephone number is (571) 272-1419. The examiner can normally be reached on Sunday, 5:00 AM - 12:00 PM and Monday through Friday, 5:00 AM - 3:30 PM; on campus every Monday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Timothy H. Meeks can be reached on (571) 272-1423. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

**William Phillip Fletcher III/**  
Primary Examiner

May 12, 2008